

1 Beth A. Wilkinson (*pro hac vice*)
 bwilkinson@wilkinsonstekloff.com
 2 Rakesh N. Kilaru (*pro hac vice*)
 rkilaru@wilkinsonstekloff.com
 3 Kieran Gostin (*pro hac vice*)
 kgostin@wilkinsonstekloff.com
 4 Grace Hill (*pro hac vice*)
 ghill@wilkinsonstekloff.com
 5 Anastasia M. Pastan (*pro hac vice*)
 apastan@wilkinsonstekloff.com
 6 WILKINSON STEKLOFF LLP
 7 2001 M Street NW, 10th Floor
 8 Washington, DC 20036
 Telephone: (202) 847-4000
 9 Facsimile: (202) 847-4005

10 Bambo Obaro
 bambo.obaro@weil.com
 11 WEIL, GOTSHAL AND MANGES
 12 201 Redwood Shores Parkway
 Redwood Shores, CA 94065
 13 Telephone: (650) 802-3083

14 *Counsel for Microsoft Corporation*

15 [Additional Counsel Identified on Signature Page]

17 UNITED STATES DISTRICT COURT
 18 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 19 SAN FRANCISCO DIVISION

20 FEDERAL TRADE COMMISSION,

21 Plaintiff,

22 v.

23 MICROSOFT CORPORATION and
 24 ACTIVISION BLIZZARD, INC.,

25 Defendants.

Case No. 3:23-cv-02880-JSC

**DEFENDANT MICROSOFT
 CORPORATION'S STATEMENT IN
 SUPPORT OF PLAINTIFF FEDERAL
 TRADE COMMISSION'S
 ADMINISTRATIVE MOTION TO
 CONSIDER WHETHER ANOTHER
 PARTY'S MATERIAL SHOULD BE
 SEALED [ECF NO. 180]**

26
 27 Dept.: Courtroom 8—19th Floor
 Judge: Honorable Jacqueline S. Corley
 28

Pursuant to Civil Local Rule 79-5(f)(3), Defendant Microsoft Corporation (“Microsoft”) respectfully requests that the Court maintain under seal the confidential information identified below, which was provisionally filed under seal pursuant to Plaintiff Federal Trade Commission’s (“FTC” or “Plaintiff”) Administrative Motion to Consider Whether Another Party’s Material Should be Sealed (“Plaintiff’s Motion”) (ECF No. 180) in connection with the FTC’s Bench Brief Regarding Defendants’ Proffered Testimony Regarding Microsoft’s Agreements (“Plaintiff’s Bench Brief”) (ECF No. 181).

Below, Microsoft has identified highly confidential material found in Plaintiff’s Bench Brief, along with the specific bases for sealing required under Local Rule 79-5. The proposed sealing reflects Microsoft’s good-faith efforts to narrowly seek sealing of only that information which is competitively sensitive and contained in internal documents, the public disclosure of which would cause injury to Microsoft that cannot be avoided through any less restrictive alternative means:

Document	Portion to Be Filed Under Seal	Basis for Sealing Request ¹
Plaintiff’s Bench Brief	Page 2, lines 8-19	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, and business partnerships, which could be used to injure Microsoft if made publicly available.
Plaintiff’s Bench Brief	Page 2, line 27, footnote 4	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, and business partnerships, which could be used to injure Microsoft if made publicly available.

¹ Legitimate private interests warrant sealing of Microsoft information in this chart, and the unsealing of the information would result in injury to Microsoft that cannot be avoided through any less restrictive alternatives.

Document	Portion to Be Filed Under Seal	Basis for Sealing Request ¹
Plaintiff's Bench Brief	Page 3, lines 1-14	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, and business partnerships, which could be used to injure Microsoft if made publicly available.
Plaintiff's Bench Brief	Page 3, lines 26-27, footnotes 5-6	This portion contains non-public and highly sensitive information including, but not limited to, internal decision-making processes, investment decisions, strategic evaluation of forward-looking opportunities, and business partnerships, which could be used to injure Microsoft if made publicly available.

ARGUMENT

I. Sealing Portions of Plaintiff's Bench Brief Is Warranted Under Ninth Circuit Precedent as They Contain Microsoft's Confidential Business Information

The above-mentioned excerpts of Plaintiff's Bench Brief contain competitively sensitive business information and warrant sealing. In the Ninth Circuit, "[p]arties seeking to seal judicial records relating to motions that are 'more than tangentially related to the underlying cause of action,' bear the burden of overcoming the presumption with 'compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure.'" *Lenovo (United States) Inc. v. IPCom GmbH & Co., KG*, 2022 WL 2313948, at *1 (N.D. Cal. Jun. 28, 2022); *see also Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) ("[T]he court must 'conscientiously [] balance the competing interests' of the public and the party who seeks to keep certain judicial records secret.")). Courts in this Circuit regularly find that sealing is warranted where the records or information that are sought to be sealed could be used "as sources of business information that might harm a litigant's competitive standing." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978); *see also In re Elec. Arts, Inc.*, 298 F. App'x 568, 569 (9th Cir. 2008) (same); *Velasco v. Chrysler Grp. LLC*, 2017 WL 445241, at *2 (C.D. Cal. Jan. 30, 2017) (stating that "district courts in this Circuit have

1 sealed records containing ‘information about proprietary business operations, a company’s business
2 mode or agreements with clients,’ [and] ‘internal policies and strategies’”) (internal citations omitted).

3 “The Ninth Circuit has explained that ‘in general, compelling reasons sufficient to outweigh the
4 public’s interest in disclosure and justify sealing court records exist when such court files might have
5 become a vehicle for improper purposes, such as the use of records to . . . release trade secrets.’” *Velasco*,
6 2017 WL 445241, at *2 (quoting *Elec. Arts*, 298 F. App’x at 569); *see also Elec. Arts*, 298 F. App’x at
7 569 (“A ‘trade secret may consist of any formula, pattern, device or compilation of information which
8 is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors
9 who do not know or use it.’”) (citation omitted). A court has “broad latitude” to grant protective orders
10 to prevent disclosure of “many types of information, including, but not limited to, trade secrets or other
11 confidential research, development, or commercial information.” *Phillips ex rel. Estates of Byrd v. Gen.*
12 *Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002).

13 In determining whether a document should be filed under seal, courts consider, among other
14 things, the measures taken to guard the information’s secrecy and the value of the information to the
15 business or its competitors. *E.g., Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206,
16 1212 (9th Cir. 2002). Here, Microsoft seeks to maintain under seal only the portions of Plaintiff’s Bench
17 Brief that reference and reflect, among other things, confidential, proprietary information relating to
18 Microsoft’s internal decision-making processes, investment decisions, strategic evaluation of forward-
19 looking opportunities, market share analyses, assessment of the competitive landscape, business
20 partnerships, terms of existing confidential agreements, revenue figures and projections, and internal
21 presentations discussing business strategy. The disclosure of this information could be used to injure
22 Microsoft if made publicly available.

23 **II. Sealing Portions of Plaintiff’s Bench Brief Is Necessary to Protect Microsoft’s Confidential** 24 **and Proprietary Business Information**

25 Microsoft supports maintaining under seal narrowly tailored excerpts of the above-mentioned
26 excerpts of Plaintiff’s Bench Brief, which contain Microsoft’s non-public and highly sensitive
27 information from documents obtained during the course of the FTC’s investigation and during litigation
28 discovery. Examples of such confidential information include, but are not limited to, Microsoft’s

1 internal decision-making processes, investment decisions, strategic evaluation of forward-looking
 2 opportunities, market share analyses, assessment of the competitive landscape, business partnerships,
 3 terms of existing confidential agreements, revenue figures and projections, and internal presentations
 4 discussing business strategy. Disclosure of this information would provide Microsoft's competitors with
 5 private data about Microsoft's performance and business strategy, which could harm Microsoft's
 6 competitive standing. *See Cont'l Auto. Sys. v. Avanci, LLC*, 2019 WL 6612012, at *4 (N.D. Cal. Dec.
 7 5, 2019). Thus, the unsealing of this highly confidential and sensitive information would cause injury
 8 to Microsoft that cannot be avoided through less restrictive alternatives.

9 Finally, Microsoft provided the FTC with confidential business information from the above-
 10 mentioned excerpts of Plaintiff's Bench Brief pursuant to the statutory and regulatory guarantees of
 11 confidentiality contained in the Hart-Scott-Rodino Act or the FTC Act. *See* 15 U.S.C. §§ 18a(h), 46(f),
 12 57b-2(b), 57b-2(c); 6 C.F.R. § 4.10(d)-(g). In similar cases, the FTC has acknowledged the need to
 13 maintain the confidentiality of a party's confidential business information that has been provided to the
 14 FTC via a regulatory request. *See, e.g., FTC v. Lockheed Martin Corp.*, 2022 WL 1446650, at *2 (D.D.C.
 15 Jan. 25, 2022) ("According to the FTC, sealing the complaint is appropriate . . . because the filing
 16 includes confidential information submitted . . . pursuant to 'statutory and regulatory guarantees of
 17 confidentiality.' . . . The requested sealing covers only confidential information and is, according to the
 18 FTC, required by regulation.").

19 **III. Conclusion**

20 As stated above, compelling reasons justify Microsoft's request for sealing the confidential
 21 business information contained in the above-mentioned excerpts of Plaintiff's Bench Brief. Microsoft
 22 therefore respectfully requests that this Court grant its Administrative Motion. In accordance with Civil
 23 Local Rule 7-11, Microsoft has also filed a Proposed Order herewith.

24
 25 Dated: July 3, 2023

Respectfully submitted,

26 By: /s/ Beth Wilkinson

27 Beth Wilkinson (*pro hac vice*)
 28 Rakesh N. Kilaru (*pro hac vice*)
 Kieran Gostin (*pro hac vice*)

1 James Rosenthal (*pro hac vice*)
2 Grace Hill (*pro hac vice*)
3 Anastasia M. Pastan (*pro hac vice*)
4 Sarah Neuman (*pro hac vice*)
5 Alysha Bohanon (*pro hac vice*)
6 Jenna Pavelec (*pro hac vice*)
7 WILKINSON STEKLOFF LLP
8 2001 M Street, N.W., 10th Floor
9 Washington, D.C. 20036
10 Telephone: (202) 847-4000
11 Facsimile: (202) 847-4005
12 bwilkinson@wilkinsonstekloff.com
13 rkilaru@wilkinsonstekloff.com
14 jrosenthal@wilkinsonstekloff.com
15 kgostin@wilkinsonstekloff.com
16 ghill@wilkinsonstekloff.com
17 apastan@wilkinsonstekloff.com
18 sneuman@wilkinsonstekloff.com
19 abohanon@wilkinsonstekloff.com
20 jpavelec@wilkinsonstekloff.com

21 Bambo Obaro (SBN 267683)
22 WEIL, GOTSHAL & MANGES LLP
23 201 Redwood Shores Parkway
24 Redwood Shores, CA 94065
25 Telephone: (650) 802-3083
26 Facsimile: (650) 802-3100
27 bambo.obaro@weil.com

28 Megan A. Granger (*pro hac vice*)
Michael Moiseyev (*pro hac vice*)
WEIL, GOTSHAL & MANGES LLP
2001 M Street, NW
Suite 600
Washington, DC 20036
Telephone: (202) 682-7000
Facsimile: (202) 857-0940
megan.granger@weil.com
michael.moiseyev@weil.com

Counsel for Defendant Microsoft Corp.